(20)

SEP 23 1941

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 640.....

GARTLAND STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

INTERLAKE IRON CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT OF PETITION.

FREDERICK L. LOCKIE,
LEE C. HINSLEA,
LUCIAN Y. RAY,
Counsel for Petitioner.

DUNCAN LOCKIE MCCREARY SCHLITZ & HINSLEA,
WARNER, NORCROSS & JUDD,
Of Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

PETITION FOR WRIT OF CERTIORARI..... 1

A. Statement 1

B. Reasons Relied On for the Allowance of the Writ.. 3

1. The Circuit Court of Appeals has decided an important question of federal law which should be but has not been settled by this Court..... 3

2. The Circuit Court of Appeals has decided an important question of general law in a way which is untenable and in conflict with the weight of authority 4

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 7

I. Opinions of the Courts Below..... 7

II. Jurisdiction 7

III. Statutes Involved 7

IV. Statement of the Case..... 8

V. Questions Presented 13

VI. Specification of Errors..... 13

Argument 14

POINT I.—Where, in a personal, private contract of carriage, the parties agree that the vessel owner shall be exempted from all liability for losses resulting from unseaworthiness if due diligence to make her so has been exercised, there is no warranty of seaworthiness and the owner's lack of privity or knowledge carries with it the right to limit 14

POINT II.—Even if the Burlington had been loaded to a draft at which a safe traverse of Lake Macatawa might reasonably have been made, with a fair margin for error in calculation and seasonal variation, the stranding would still have occurred and the alleged negligence could not have been the proximate cause of the disaster.. 17

Conclusion 18

AUTHORITIES CITED.

Cases.

The Malcolm Baxter, Jr., 277 U. S. 323, 333..... 17

Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334..... 14

Chicago, R. I. & P. Ry. Co. v. Fanning (C. C. A. 2), 42 F. (2d), 799, 803..... 4

Craig v. Continental Ins. Co., 141 U. S. 638, 646..... 15

Cullen Fuel Co. v. W. E. Hedger, Inc., 290 U. S. 82.... 14

The 84-H, 296 Fed. 427, 431 (2 C. C. A.), certiorari denied, 264 U. S. 596..... 16

Hockley v. Eastern Transportation Co. (D. C. Md.), 10 F. Supp. 908..... 15

Isbrandtsen-Moller Co. Inc. v. M/S Toledo (C. C. A. 2d), 1941 A. M. C. 1219..... 15

May v. Hamburg, etc., 290 U. S. 333.....4, 17

Richardson v. Harmon, 222 U. S. 96..... 14

Princess Sophia, 61 Fed. (2d) 339, certiorari denied, 288 U. S. 604..... 16

The Francis Wright, 105 U. S. 381, 387..... 17

Texts.

Restatement of the Law of Torts, Sec. 432 (1)..... 4

Restatement of the Law of Torts, Section 432 (1) (a).. 17

Shearman & Redfield, Law of Negligence (5 Ed.) Sec. 39 4

Statutes.

Limited Liability Act, Section 3 (Title 46, Section 183, U. S. C.)..... 7

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GARTLAND STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

INTERLAKE IRON CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

A.

STATEMENT.

The petition of The Gartland Steamship Company, a corporation, respectfully shows:

On December 2, 1938, the steamer Burlington, a steel vessel owned by petitioner, loaded a cargo of pig iron belonging to the respondent at Toledo, Ohio and destined for delivery at the Harrington Coal Dock at Holland, Michigan. The dock is located at the head of Lake Macatawa about six miles from Lake Michigan and is reached by a vessel proceeding first through two outer breakwater piers to a stilling basin, through two inner piers to Lake Macatawa and through a dredged channel to the dock.

When the Burlington was in mid-channel and approximately three-fourths of her length through the outer piers into the stilling basin, she stranded. Her master succeeded

in freeing her from this strand by backing into Lake Michigan, where the wind and sea carried her hard aground at a point north of the north breakwater. She became a total loss in the storm which followed, with the loss of a small part of her cargo and the salvaging of the remainder.

The petitioner duly filed its petition for exoneration from, or limitation of, its liability, in the United States District Court for the Western District of Michigan. The respondent filed its claim for loss of cargo and the salvage expenses incurred. Its answer denied all of the material allegations of the petition. Virtually all of the testimony on the merits was heard in open court and there is little dispute as to the facts.

The trial court found that the petitioner had exercised due diligence to make the vessel seaworthy at the time she broke ground at Toledo and that the loss occurred through a "danger of navigation or a peril of the sea," liability for which was exempted by the provisions of the bill of lading which was part of the contract of carriage. The Court ruled that the vessel's estimated draft upon arrival at Holland of 17 feet 3 inches forward and 17 feet 6.1 inches aft, was sufficient to have made it safe to have passed through the outer piers had there been only the seasonal drop of approximately 8½ inches instead of the actual drop of about 2 feet that existed by reason of an unusual barometric phenomenon known as a "seiche," a contingency the master could not reasonably have foreseen. The Court ruled that conditions in Lake Macatawa were not controlling. It entered a final decree dismissing all claims arising out of the loss of the vessel and her cargo.

Upon appeal, the Circuit Court of Appeals accepted the findings of fact of the trial court, but rejected its conclusion that the vessel was seaworthy or that due diligence had been exercised to make her so, at the inception of the voyage. The Appellate Court ruled that, as the estimated draft of the vessel at the time she would have reached

Lake Macatawa was not such so that she could have safely traversed the Lake to the dock, she was not fit for her contemplated voyage, and therefore unseaworthy. While conceding that when unseaworthiness is the basis of the claim there must be a causal relation between the unseaworthiness and the loss, the Appellate Court ruled that the causal relation had been established and the test of proximity met if the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about, though the precise result is not foreseen. It concluded that the conditions at Lake Macatawa were of controlling importance inasmuch as had the vessel been loaded to safely traverse the Lake with a reasonable margin for error in calculation and seasonal variation she would probably not have stranded at the entrance to the harbor.

The Circuit Court of Appeals further ruled that the contract of carriage was personal to the petitioner, which carried with it a warranty of seaworthiness unaffected by the lack of privity or knowledge, the breach of which operated to deny limitation of liability. Having found that the vessel was unseaworthy before she broke ground at Toledo, the Court ruled that the vessel was not entitled to the bill of lading exemption against losses "incurred by reason of dangers of navigation or a peril of the seas."

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of federal law which should be but has not been settled by this Court.

The Court below, following controlling decisions of this Court, has ruled that as the contract of carriage was personal to the petitioner, "there is a warranty of seaworthiness and lack of the owner's privity or knowledge will not permit of limitation." We concede the soundness

of that general principle, but the question here involved is whether the owner is similarly denied limitation, in the absence of privity or knowledge, when the parties themselves have agreed that there shall be no warranty. We know of no authoritative decision on this point.

The bill of lading, containing the exemption to which reference has been made, is a standard one adopted in 1936 by most of the vessel owners on the Great Lakes engaged in the transportation of bulk cargo. The importance of securing a final determination of the effect of a provision so commonly used, upon the vessel owner's rights under the statutes granting limitation of liability is, we respectfully urge, manifest.

2. The Circuit Court of Appeals has decided an important question of general law in a way which is untenable and in conflict with the weight of authority.

The Court below, following the doctrine settled in the case of *May v. Hamburg, etc.*, 290 U. S. 333, has ruled that if unseaworthiness is not the proximate cause of the loss the vessel may not be charged with damages. Contrary to the decision of the District Court, which applied foreseeability as the test, the Appellate Court has adopted the "substantial factor" rule and then has misapplied the rule itself. By the weight of authority, an actor's negligence cannot be a substantial factor in producing harm, if the harm would have been sustained even if the actor had not been negligent. *Shearman & Redfield, Law of Negligence* (5 Ed.) Sec. 39; *Restatement of the Law of Torts*, Sec. 432 (1); *Chicago, R. I. & P. Ry. Co. v. Fanning* (C. C. A. 2), 42 F. (2d) 799, 803. A reasonable construction of the proof in this cause requires the conclusion that a proper loading for all phases of the voyage, including Lake Macatawa, would not have prevented the disaster. The standard of care imposed by this decision, in addition to being erroneous, would create practical problems of vessel operation onerous in the extreme.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket, No. 8512, Interlake Iron Corporation, Appellant, v. The Gartland Steamship Company, Appellee, and that the said judgment of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

THE GARTLAND STEAMSHIP COMPANY,

By FREDERICK L. LECKIE,

Counsel for Petitioner.

DUNCAN LECKIE MCCREARY SCHLITZ & HINSLEA,
WARNER, NORCROSS & JUDD,

Of Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GARTLAND STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

INTERLAKE IRON CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Michigan (R. 469-476) are reported in 1939 A. M. C. 965. The opinion of the Circuit Court of Appeals is reported in 121 F. 2d 267.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 25, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATUTES INVOLVED.

The only statute involved is Section 3 of Limited Liability Act (Title 46, Section 183, U. S. C.).

IV.

STATEMENT OF THE CASE.

On December 6, 1936, the steamer Burlington, laden with a cargo of pig iron destined to the Harrington Coal Dock at Holland, Michigan, stranded while entering the outer harbor and, with part of her cargo, became a total loss. A claim for cargo damage having been asserted by the respondent herein, the petitioner, on July 7, 1938, filed its petition in the United States District Court for the Western District of Michigan, seeking exoneration from or limitation of its liability. The petition alleged that due diligence had been shown to make the vessel seaworthy at the time she left Toledo and that she was in fact seaworthy at that time; that the stranding resulted from an error in the navigation or management of the vessel, or a danger of navigation not within the privity or knowledge of the petitioner and without its fault; that freedom from liability further existed by reason of a bill of lading provision granting exemption where there had been due diligence shown to make the vessel seaworthy as to the causes of the loss. (R. 1-8.)

The respondent filed its claim and answer seeking the recovery of approximately $25,000.00 as the value of cargo lost and salvage expenses for the remainder and specifically denied all of the material allegations of the petition. (R. 18-25.)

Virtually all of the testimony on the merits was received in open court. A resume of the Court's findings, based upon practically undisputed evidence, is as follows:

> The Burlington was a steel vessel 258 feet long, 42 feet 6 inches beam and 26 feet molded depth. Upon completion of her loading at Toledo her draft was 17 feet forward and 18 feet 4 inches aft. Her estimated draft at her arrival at the entrance to the harbor at Holland, due to consumption of coal, was 17 feet 3 inches forward and 17 feet 6.1 inches aft. (R. 469.)

The Harrington Coal Dock, to which the vessel was bound, is about six miles from Lake Michigan at the head of Lake Macatawa and is reached by a vessel proceeding first through outer breakwater piers to a stilling basin, then through inner piers to Lake Macatawa and through a dredged channel to the dock. The stranding occurred while the Burlington was in mid-channel and approximately three-fourths of her length through the outer piers into the stilling basin. Her master succeeded in freeing her from the strand by backing her into Lake Michigan, where the wind and sea carried her hard aground at a point north of the north breakwater. She became a total loss in the storm which followed.

Immediately after the stranding, a member of the Coast Guard came aboard the vessel and reported that the water was down about 2½ feet. (R. 470.)

The master and the petitioner had been advised by Lake Survey Bulletin No. 45, issued in April 1936, and Supplement No. 2, issued in July 1936, by the Lake Survey Office of the War Department that the depths of water at low water datum level, after completion of dredging on June 6, 1936, in the approaches to Holland were as follows: 21 feet 7.2 inches over the entrance bar in Lake Michigan; 19 feet 6 inches in the stilling basin; 19 feet between the inner piers and 18 feet in the channel through Lake Macatawa. No additional dredging was done prior to the loss of the Burlington.

Bulletin No. 45, in addition to giving information as to seasonal variation in the water level, described an additional occasional fluctuation known as a seiche as follows:

> "In addition to the annual fluctuation, there are occasional oscillations of irregular amount and duration. Sometimes these are apparently seiches, resulting from variations in barometric pressure, which may produce changes ranging from a few inches to several feet, and return to normal, within a few hours. At other times the level is affected by winds of sufficient velocity to drive the surface water forward in greater volume than that carried

by the lower return currents, thus raising the elevation on the lee shore and lowering it on the weather shore. * * *"

The average level of Lake Michigan for the Decembers of 1932 to 1935 was about 8½ inches below low water datum. Neither the master nor the petitioner made inquiry before the vessel left Toledo as to the general water level in Lake Michigan, nor the depth to be expected at Holland. The vessel was not equipped with a radio and there was no way in which the master could have learned the actual depth at Holland prior to arrival off the Holland breakwater. No requirement of law or good seamanship required her to have a radio. (R. 470-474.)

While the master knew that the depth of water to be expected in approaching Holland in December would probably be less than depicted on the charts, he could not have reasonably anticipated that the water would be abnormally low to the extent of about 2 feet. His action in attempting to enter the harbor, under these circumstances, was reasonable. (R. 474.)

Had the Burlington reached Lake Macatawa the disaster would not have happened and the conditions existing there are not of controlling importance. Had the water remained the same as after the 1936 dredging, even with the seasonal drop of 8½ inches, the vessel's draft at the entrance bar would have a clearance of nearly 5 feet on the north half and about 3 feet 5 inches on the south half. (R. 475.)

The abnormal lowering of the water resulted from the presence of a seiche, which is entirely unpredictable; scientists know little about it and there was no information given to the master to put him on guard as to its occurrence. The change in the water level may be a few inches or several feet. (R. 473.)

There is nothing in the record which would sustain a conclusion that the vessel was unseaworthy because the master did not assume the existence of storm bars or shoaling which would not accommodate a draft of approximately 17½ feet, nor that an ordinarily prudent master would not have so loaded his vessel. (R. 475.)

A private contract of carriage was entered into verbally between the petitioner and claimant several months prior to the voyage. It was generally understood, in conformance with custom and usage prevailing on the Great Lakes, that a bill of lading would issue, the terms of which would be binding on the parties. Paragraph 1 of the Bill of Lading which was issued provided that the shipment was subject to the following terms and conditions:

> "1. The carrier shall not be liable for any claim whatsoever, whensoever and howsoever occurring, arising from compliance by the carrier with any directions whatsoever by any government or by any person purporting to act under authority thereof; or resulting from fault or error in the management or navigation of the vessel; or unseaworthiness or latent or other defect in any part of the hull, boilers, machinery, or appurtenances of the vessel, even though existing at the time of loading or at the beginning of the voyage, provided the carrier shall have exercised due diligence to make the vessel seaworthy with respect to the matters or things producing the loss, damage or delay." (R. 471-2.)

Based upon these findings the trial court concluded as a matter of law that the Burlington, at the time she broke ground at Toledo, was in all respects seaworthy, properly manned and equipped and that due diligence had been exercised to make her so; that the loss of the vessel and the damages resulting therefrom was caused by a peril of the sea or danger of navigation which could not have been avoided by her master; that as the bill of lading which formed a part of the contract of carriage contained an exemption against liability for loss of cargo resulting from dangers of navigation, the petitioner was exonerated; that the cargo was transported by the petitioner as a private carrier and incurred no liability for loss or damage resulting solely from a danger of navigation or peril of the sea; that the petitioner was entitled to a judgment exempting

it from all liability for loss of cargo or for other claims arising out of the stranding. (R. 476.)

The Court, against the contingency of an appeal, concluded further that the loss or damage to claimant's cargo was incurred without the privity or knowledge of the petitioner and that it was therefore entitled to limit its liability under the statute. (R. 476.)

A final decree dismissing all claims arising out of the loss of the vessel and her cargo was filed July 31, 1939. (R. 477.)

The Circuit Court of Appeals impliedly adopted the findings of the trial court. It ruled that as the expectable depth of water in Lake Macatawa at the time of the vessel's arrival was 17 feet 3½ inches less allowances for shoaling and without consideration of the direction and velocity of the wind, the vessel with a draft of 17 feet 3 inches forward and 17 feet 6 inches aft could not have reasonably been expected to make the voyage on which she was embarked and was therefore unseaworthy.

The Appellate Court rejected the argument that even if the vessel was too heavily laden to have negotiated the channel through Lake Macatawa, that fault was not the cause of the disaster since the stranding did not occur there but at the entrance to the stilling basin, and ruled that the causal relation is established and the test of proximity met if the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about though the precise result is unforeseen. (R. 498.) It concluded that the conditions existing at Lake Macatawa were of controlling importance in that if the vessel's draft had been such as would have made a traverse of the Lake reasonably safe with a fair margin for error in calculation and seasonal variation, she probably would not have stranded at the entrance to the harbor. (R. 499.)

The Court further held that as the contract of carriage was personal to the petitioner it carried with it a

warranty of seaworthiness, unaffected by lack of privity or knowledge, the breach of which operated to deny limitation. Having found that the vessel was unseaworthy before she broke ground at Toledo, the Court ruled that the petitioner was not entitled to the bill of lading exemption against losses "resulting from the dangers of navigation or a peril of the sea." (R. 499.)

The judgment of the Circuit Court of Appeals, having reversed that of the District Court, remanded the cause with directions to enter a decree awarding damages to the appellant in the amount established at the trial, together with interest from December 6, 1936, at the rate permitted by law. (R. 493.)

V.

QUESTIONS PRESENTED.

1. Whether, in a personal, private contract of carriage where the parties agree that the vessel owner shall be exempted from all liability for losses resulting from unseaworthiness if due diligence to make her so has been exercised, there is still a warranty of seaworthiness which makes immaterial his lack of privity or knowledge.

2. Whether, when the proof is that the vessel would have stranded in the outer harbor even though she had been loaded to a safe draft for Lake Macatawa, the alleged unseaworthiness could have been the proximate cause of the loss.

VI.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in finding and holding:

1. That there was an implied warranty of seaworthiness in the contract of carriage unaffected by the exemption in the bill of lading and the owner's lack of privity or knowledge.

2. That the failure to have loaded the vessel to a draft where a safe traverse of Lake Macatawa might reasonably have been made with a fair margin for error in calculation and seasonal variation, was a substantial factor in the stranding and the proximate cause of the disaster.

3. That the owner had not exercised due diligence in making the vessel seaworthy.

4. That the stranding resulted from unseaworthiness and not from a danger of navigation.

ARGUMENT.

POINT I.

Where, in a personal, private contract of carriage, the parties agree that the vessel owner shall be exempted from all liability for losses resulting from unseaworthiness if due diligence to make her so has been exercised, there is no warranty of seaworthiness and the owner's lack of privity or knowledge carries with it the right to limit.

This Court, in an unbroken line of recent decisions, has addressed itself to the question of the warranties arising out of the personal contracts of the shipowner. While announcing that the right to limit does not exist with respect to his personal acts, done with knowledge (*Richardson v. Harmon*, 222 U. S. 96), it has confined the doctrine to those acts to be performed by him personally and not through the intervention of others. *Capitol Transportation Co. v. Cambria Steel Co.*, 249 U. S. 334. It has decided also that denial of limitation in the application of the personal contract doctrine relates to implied as well as to express contracts. *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82.

In all of the cases above cited the benefit of the limited liability acts has been withdrawn because of the breach of a warranty. They cannot, we respectfully submit, be authority for the proposition that a like result obtains if

something less than a warranty exists. Lack of privity or knowledge of the things causing or contributing to the loss, which makes effective the operation of the statute, is nullified by the very existence of the warranty. The interesting question posed by the decision below is whether the same situation exists if the parties, by agreement, have stipulated that the warranty shall be modified. Two lesser federal courts have discussed the effect of agreements between the parties on the warranty of seaworthiness but both are distinguishable. *Isbrandtsen-Moller Co. Inc. v. M/S Toledo* (C. C. A. 2d), 1941 A. M. C. 1219; *Hockley v. Eastern Transportation Co.* (D. C. Md.), 10 F. Supp. 908. Our research has failed to develop the existence of any decision in point.

A reasonable construction of Paragraph 1 of the bill of lading requires the conclusion that its purpose was to modify the warranty. While the term unseaworthiness appears in juxtaposition to the phraseology relating to the "hull, boilers, machinery or appurtenances of the vessel," the remainder of the provision clearly indicates that it was intended to be given general application. The obligation to exercise "due diligence to make the vessel seaworthy with respect to the matters or things producing the loss, damage or delay" was not restricted to the hull and machinery alone, for loss and delay could result from unseaworthiness in all of its varied forms.

As we urged below, with no warranty of seaworthiness involved, the only manner in which the petitioner can be deprived of its right to limit liability to the value of the Burlington immediately after the disaster, is that the petitioner, being a corporation, through its officers or managerial agents, had actual knowledge that the Burlington was overloaded when she left Toledo, in anticipation of the harbor conditions to be met when she arrived at Holland. *Craig v. Continental Ins. Co.*, 141 U. S. 638, 646;

The 84-H, 296 Fed. 427, 431 (2 C. C. A.), certiorari denied, 264 U. S. 596; *Princess Sophia*, 61 Fed. (2d) 339, certiorari denied, 288 U. S. 604.

The District Court concluded as a matter of law that the loss or damage was incurred without the privity or knowledge of the petitioner. (R. 476.) The Appellate Court made no finding on this point.

If the ruling below is not in direct conflict with the above cited decisions of this Court on the necessity of a warranty to preclude operation of the limited liability statutes, it is impliedly so. In each of them the warranty existed in unmodified form and the conclusion is justified that its existence was the foundation of the principles announced. The Circuit Court of Appeals has here applied these principles unsupported by a finding that a warranty in fact existed and in the face of an agreement expressly designed to prevent it from coming into being.

This is not simply the case of an isolated shipowner attempting to effectively enforce his rights. The same provision is in general use and applies to a majority of the contracts of carriage on the Great Lakes. The question of whether this provision is ineffective to preserve for all of these owners the protection of the limited liability statutes, in the event a vessel is in fact unseaworthy, without their privity or knowledge, is one of such general interest as to require a final decision by this Court.

POINT II.

Even if the Burlington had been loaded to a draft at which a safe traverse of Lake Macatawa might reasonably have been made, with a fair margin for error in calculation and seasonal variation, the stranding would still have occurred and the alleged negligence could not have been the proximate cause of the disaster.

The alleged unseaworthiness of the Burlington is the basis of this suit. In a case of this type there can be no recovery of damages in the absence of a causal relation between the loss and the defect. *May v. Hamburg, etc., supra*; *The Malcolm Baxter, Jr.*, 277 U. S. 323, 333; *The Francis Wright*, 105 U. S. 381, 387. The Circuit Court of Appeals considered that the causal connection was complete and the test of proximity had been met, because the overloading at Toledo was a substantial factor in the stranding. The error into which the Court has fallen in this connection stems from its failure to have applied the proper rule for determining the existence of the "substantial factor." The line of causation is definitely broken and with it the possibility of the negligence being the proximate cause of the loss, if the loss would have occurred even though there had been no negligence. Or, as better stated in the *Restatement of the Law of Torts*, Section 432 (1) (a):

> "If, without the actor's negligent conduct, the other would have sustained harm, the same in character and extent as that which he receives, the actor's conduct, not being even its necessary antecedent, is not a substantial factor in bringing it about."

Even assuming that the Circuit Court of Appeals is sound in its conclusion that conditions in Lake Macatawa were controlling, an analysis of the undisputed facts as to drafts and expectable depths of water demonstrates that the stranding would have occurred irrespective of how much care had been exercised at Toledo.

The Court below has found that "the expectable depth of water in Lake Macatawa was 17 feet 3½ inches, less

some allowances for shoaling, and without consideration to the direction and velocity of the wind." (R. 497.) The Court gave no indication as to how much allowance should be made for those factors. The District Court found that at the time of the stranding the water level had dropped about 2 feet (R. 474), and that the average seasonal drop to be expected was 8½ inches. (R. 475.) The depth of the water in the stilling basin after the dredging on June 6, 1936 was 19 feet 6 inches (R. 472), which also does not take into consideration the effect of the wind and shoaling. Even if the Burlington had been loaded to a foot less draft, which should have been ample to meet all expectable conditions in Lake Macatawa, with the unexpected drop in excess of two feet in the water level in the stilling basin, the margin of safety would have been so slight as to have made stranding almost a foregone conclusion.

The practical effect of the Court's ruling on this aspect of the case will be to force owners to only partially load their vessels to escape its consequences. The proximate cause of this stranding was an abnormal lowering of the water due to an unpredictable phenomenon known as a "seiche." This may produce water level changes "ranging from a few inches to several feet" according to the findings of the United States Engineers. (R. 473.) To require carriers to load to meet such a contingency would be to virtually paralyze lake traffic.

CONCLUSION.

The Decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

FREDERICK L. LECKIE,
LEE C. HINSLEA,
LUCIAN Y. RAY,
Counsel for Petitioner.

DUNCAN LECKIE MCCREARY SCHLITZ & HINSLEA,
WARNER, NORCROSS & JUDD,
Of Counsel for Petitioner.

OCT 11 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 640.

GARTLAND STEAMSHIP COMPANY,
Petitioner,

—against—

INTERLAKE IRON CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

HENRY N. LONGLEY,
Counsel for Respondent,
99 John Street,
New York, N. Y.

JOHN W. R. ZISGEN,
HARRY SHULSKY,
Of Counsel.

INDEX.

PAGE

Introduction 1

Argument 1

POINT I—Petitioner is liable to respondent on the facts found concurrently by the courts below... 1

POINT II—Petitioner is not entitled to limit its liability under the provisions of 46 U. S. C. ¶183 as petitioner breached its personal contract ... 5

Conclusion 6

TABLE OF CASES:

Caledonia, The, 157 U. S. 124, 130, 131 3

Edwin I. Morrison, The, 153 U. S. 199, 210 3

Isis, The, 290 U. S. 333, 345 3

Johnson v. *Kosmos Portland Cement Co.,* 64 F. (2d) 193 (C. C. A. 6), cert. denied, 290 U. S. 641 4

Norris Grain Co. v. *Great Lakes Transit Corp.,* 70 F. (2d) 32 (C. C. A. 7), cert. denied 293 U. S. 565... 4

STATUTE:

46 U. S. Code, ¶183 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 640.

GARTLAND STEAMSHIP COMPANY,
Petitioner,

—against—

INTERLAKE IRON CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The Circuit Court of Appeals for the Sixth Circuit found that the loss of respondent's cargo and the expenses which respondent necessarily incurred, proximately resulted from the unseaworthiness of petitioner's vessel, the S. S. "Burlington", existing as the result of petitioner's lack of due diligence (R. 497). Petitioner would have this Court reverse that finding.

ARGUMENT.

POINT I.

Petitioner is liable to respondent on the facts found concurrently by the courts below.

The Circuit Court of Appeals and the District Court (for the Western District of Michigan) made the following findings concurrently:

1. Petitioner contracted with respondent to

carry respondent's cargo from Toledo, Ohio, to the Harrington Coal Dock at Holland, Mich., on the S. S. "Burlington", during the month of December, 1936 (D. C., R. 469; C. C. A., R. 494).

2. To reach Holland it is necessary for a vessel to sail from Lake Michigan between two breakwaters, thence through a stilling basin, thence between two inner piers to Lake Macatawa, and thence for a distance of six miles through a dredged channel in that lake to the dock (D. C., R. 469-70; C. C. A., R. 494-5).

3. After completion of dredging operations on June 6, 1936, at low water datum level (578.5 feet above mean low water at New York), there was 19 feet of water in the channel between the inner piers and 18 feet in the six-mile long channel in Lake Macatawa (D. C., R. 472; C. C. A., R. 495).

4. The water level of Lake Michigan varies seasonally with the lowest level during the winter. The average level of Lake Michigan for the Decembers of 1932 to 1935 inclusive was about 8½ inches below low water datum level (D. C., R. 472, 474; C. C. A., R. 495, 496).

5. After deducting 8½ inches as the expectable diminution of the water level from low water datum level, but without giving consideration to shoaling between June and December or to the direction and velocity of the wind, the depths expectable in December, 1936, were 18 feet 3½ inches in the channel between the inner piers and 17 feet 3½ inches in the six-mile long channel in Lake Macatawa (D. C., R. 472, 474; C. C. A., R. 495, 496, 497).

6. When the "Burlington" sailed from Toledo she drew 17 feet forward and 18 feet 4 inches aft.

It was then to be expected that consumption of coal and water during the voyage would reduce her drafts so that upon arrival off Holland she would draw 17 feet 3 inches forward and 17 feet 6.1 inches aft (D. C., R. 469; C. C. A., R. 494).

7. Neither the petitioner nor the master made any inquiry, before the vessel broke ground at Toledo, concerning the water levels existing at Holland and, after sailing, the master could not ascertain the actual depths prevailing there because the vessel was not equipped with radio (D. C., R. 474; C. C. A., R. 496).

As it is obvious that a vessel drawing 17 feet 6 inches aft could not navigate for six miles in a channel where there is something less than 17 feet 3½ inches of water, the Circuit Court of Appeals held that when the "Burlington" sailed from Toledo she was unseaworthy for the voyage which petitioner had contracted to make (R. 497). As all of the data relating to expectable conditions at Holland was contained in official governmental publications available to anyone interested, that Court found that the petitioner had not exercised due diligence in permitting this vessel to sail from Toledo with the drafts she had (R. 497).

Petitioner was obligated to provide a seaworthy vessel for the voyage contracted for, *i. e.*, for a voyage from Toledo to the Harrington Coal Dock at Holland.

> *The Edwin I. Morrison,* 153 U. S. 199, 210;
> *The Caledonia,* 157 U. S. 124, 130, 131;
> *The Isis,* 290 U. S. 333, 345.

As the vessel was unseaworthy for the voyage contracted for because, when she sailed on that voyage, her drafts were such that she could not be expected safely to complete the voyage, and as the vessel

stranded where she did because "her draft * * * was too great for the depth of the water which she encountered" (D. C. Finding of Fact 11, R. 471), the Circuit Court of Appeals found that the stranding resulted from the vessel's unseaworthiness (R. 497, 499).

As we understand it, petitioner's argument is that the vessel would not have stranded where she did were it not that on the morning of the stranding the water level at Holland was abnormally depressed because of a phenomenon known as a "seiche" which was not foreseeable. It is urged, therefore, that the stranding resulted from a peril of navigation and was not proximately related to the vessel's unseaworthiness even though that unseaworthiness was bound to cause the vessel to strand, whether or not there was a seiche, a few hundred yards from the point where in fact she did strand.

The Circuit Court of Appeals applied the doctrine of *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. (2d) 193, certiorari denied, 290 U. S. 641, holding (R. 498) that causal relation must be recognized—

> "whenever the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about even though the precise result may not be foreseen. The test of proximity has been satisfied if a generally dangerous result was within the realm of expectability."

The Court pointed out that that principle is the rationale of *Norris Grain Co.* v. *Great Lakes Transit Corp.*, 70 F. (2d) 32 (C. C. A. 7), cert. denied, 293 U. S. 565.

Petitioner does not argue that there is any conflict between the circuits as to this principle; it would have

this Court overrule this established doctrine. We submit that the principle is salutary and logical and should not be disturbed.

POINT II.

Petitioner is not entitled to limit its liability under the provisions of 46 U. S. C. ¶183 as petitioner breached its personal contract.

Conceding the principle to be well established that if a vessel owner breaches a warranty of seaworthiness, whether expressed in its personal contract or implied in that contract by law, it is not entitled to limit its liability for damages flowing from that breach, under the provisions of 46 U. S. C. ¶183, petitioner argues that the contract of the parties in this case is contained in a bill of lading and that the provisions of that bill of lading reduce the absolute warranty of seaworthiness implied by law to an agreement to exercise due diligence to make the vessel seaworthy. We submit that it makes little difference whether petitioner's warranty concerning the seaworthiness of the "Burlington" was absolute or merely a warranty to use due diligence: the Circuit Court of Appeals has held that due diligence was not exercised.

Moreover, the language of the bill of lading on which petitioner relies as modifying the absolute implied warranty of seaworthiness (Petitioner's Brief, p. 11), relates only to defects in the hull and machinery of the vessel and in no way touches upon unseaworthiness resulting from overloading. The warranty of seaworthiness implied by law in this respect, therefore, remains absolute.

* * *

Conclusion.

As unseaworthiness of the "Burlington" existing by reason of petitioner's lack of due diligence was proximately related to the vessel's loss; as petitioner entered into a "personal" contract with respondent in which the law imputes a personal warranty of absolute seaworthiness; as the implied warranty of absolute seaworthiness so far as concerns the ship's drafts was not in any way modified by agreement of the parties; as, in any event, petitioner's agreement to exercise due diligence was breached, we submit that, on well recognized principles and as held by the Circuit Court of Appeals, petitioner is liable to respondent to the full extent of respondent's damages, without limitation.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY N. LONGLEY,
Counsel for Respondent,
99 John Street,
New York, N. Y.

JOHN W. R. ZISGEN,
HARRY SHULSKY,
Of Counsel.